LOH SHIIUN HING

v.

KURNIA INSURANS (MALAYSIA) BHD

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: Q-02-296-08]
19 FEBRUARY 2014

INSURANCE: *Marine insurance - Character of policy - 'Voyage' and 'time' policies distinguished - Barge sank and lost in rough seas - Claim for amount insured - Repudiation of liability by insurer - Allegation of misrepresentation of identity of barge - Whether barge surveyed - Claim for amount insured in High Court - Claim dismissed on ground of failure to adduce evidence to show nature and full terms of policy - Whether voyage seaworthy - Whether insurer liable to release insured sum*

The respondent was the insurer of the appellant's barge for a period of 12 months commencing from 25 January 2002 until 24 January 2003. While carrying logs in rough seas, the barge sank and was totally lost. The appellant claimed for RM450,000 ('the insured sum') from the respondent but the claim was rejected by the latter as it was alleged that there was, *inter alia*, a misrepresentation regarding the identity of the barge. The appellant proceeded to file an action against the respondent in the High Court. In repudiating liability, the respondent argued that the respondent had undertaken to issue cover note on the basis that a ship survey would be undertaken but unknown to the respondent; the appellant brought the ship surveyor to view two other vessels instead of the vessel in question. The respondent further argued that the vessel surveyed was not the vessel in question for which the coverage was sought and that it had already sailed for its port of loading or had been lost at the time insurance cover was sought. The Judicial Commissioner ('JC') dismissed the appellant's claim on the ground that the appellant had not adduced any evidence to show the nature and full terms of the policy. The JC was of the view that the ship was insured to cover voyage in which seaworthiness was a condition precedent before the barge could be insured, by virtue of Marine Insurance

A Act 1906 ('MIA'). Furthermore, the appellant did not disclose all information which had bearing to the risk. Hence, the present appeal. The main issue before the court was the nature or the type of the policy. The JC held that it was a voyage policy and thus, seaworthiness was a condition precedent before the barge B could be insured in view of s. 39(1) of the MIA. However, it was the contention of the appellant that it was a time policy.

Held (allowing appeal with costs; setting aside judgment of High Court)

C **Per Abu Samah Nordin JCA delivering the judgment of the court:**

(1) The JC misdirected himself in holding that the appellant had not adduced any evidence to show the nature of the policy and the full terms of the policy. The proposal form and the D marine insurance policy between the appellant and the respondent were before the court. The terms of the policy were contained in the policy itself. (para 13)

(2) The nature of the policy must be determined by looking at the E terms of the policy itself and in general by reference to the merchant law as codified in the MIA. The distinction between time and voyage policies is significant because the risk under the two type of policy commences and terminates at different times. There was nothing in the policy stating that the F contract was to insure the said subject matter 'at and from' or from one place to another or others. It simply referred to policy cover for a fixed period. The policy was clearly a 'time policy' within the meaning of s. 25 of the MIA. Being a time policy, there was no implied warranty that the vessel would be G seaworthy at any state of the adventure. (paras 20, 24 & 26)

(3) The issue of seaworthiness, raised as a defence by the respondent, did not hold water. The vessel sank not because it was not seaworthy but because of stormy weather and high H seas. This was disclosed in the respondent's own final report which concluded that an accident as reported could have occurred. It would not be economical to salvage and repair the vessel and that there was no breach of warranties by the appellant. The report recommended the respondent to settle I the claim and advised the respondent that insurers' liability appears to be apparent. (para 30)

Bahasa Malaysia *Translation Of Headnotes*

Responden merupakan penanggung insurans tongkang perayu bagi tempoh 12 bulan bermula dari 25 Januari 2002 hingga 24 Januari 2003. Semasa mengangkut balak di laut bergelora, tongkang tersebut tenggelam dan hilang. Perayu menuntut RM450,000 ('jumlah yang diinsuranskan') daripada responden tetapi tuntutan tersebut telah ditolak oleh responden kerana didakwa bahawa terdapat, antara lain, salahnyataan berkenaan identiti tongkang tersebut. Perayu meneruskan dengan memfailkan tindakan terhadap responden di Mahkamah Tinggi. Dalam menafikan liabiliti, responden menghujahkan bahawa responden telah mengakujanji untuk mengeluarkan nota perlindungan atas dasar bahawa pemeriksaan kapal akan dilakukan tetapi tanpa pengetahuan responden; perayu telah membawa pemeriksa kapal untuk melihat kapal yang lain daripada kapal yang menjadi persoalan. Responden seterusnya menghujahkan bahawa kapal yang diperiksa bukanlah kapal yang menjadi persoalan yang mana perlindungan dipohon dan bahawa ia telah pun belayar ke pelabuhan muatan atau telah hilang semasa perlindungan insurans dipohon. Pesuruhjaya Kehakiman ('PK') menolak tuntutan perayu atas alasan bahawa perayu tidak mengemukakan sebarang keterangan untuk menunjukkan sifat dan terma penuh polisi. PK berpendapat bahawa kapal tersebut telah diinsuranskan untuk melindungi pelayaran yang mana kelayaklayaran adalah pra-syarat sebelum tongkang boleh diinsuranskan, menurut Marine Insurance Act 1906 ('MIA'). Tambahan lagi, perayu tidak mendedahkan kesemua maklumat yang mempunyai risiko sedemikian. Oleh itu, rayuan ini. Isu utama di hadapan mahkamah adalah sifat atau jenis polisi. PK memutuskan bahawa ia adalah polisi pelayaran dan oleh itu, kelayaklayaran adalah pra-syarat sebelum tongkang tersebut boleh diinsuranskan di bawah s. 39(1) MIA. Walau bagaimanapun, adalah menjadi hujahan perayu bahawa ia adalah polisi masa.

Diputuskan (membenarkan rayuan dengan kos; mengenepikan penghakiman Mahkamah Tinggi)
Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:

(1) PK tersalah arah dalam memutuskan bahawa perayu tidak mengemukakan sebarang keterangan untuk menunjukkan sifat dan terma penuh polisi. Borang cadangan dan polisi insurans marin antara perayu dan responden telah dikemukakan di mahkamah. Terma polisi terkandung dalam polisi itu sendiri.

(2) Sifat polisi mesti ditentukan dengan melihat terma polisi itu sendiri dan secara amnya dengan merujuk kepada undang-undang perdagangan seperti yang dikanunkan dalam MIA. Perbezaan perjalanan polisi masa dan pelayaran adalah penting kerana risiko di bawah kedua-dua jenis bermula dan tamat pada masa-masa berlainan. Tiada apa dalam polisi yang menyatakan kontrak adalah untuk menginsuranskan hal perkara 'pada dan daripada' atau daripada satu tempat ke tempat atau tempat-tempat lain. Ia merujuk kepada polisi perlindungan bagi tempoh tetap. Polisi tersebut adalah jelas 'polisi masa' dalam maksud s. 25 MIA. Sebagai polisi masa, tiada waranti tersirat bahawa kapal layak dilayarkan dalam apa jua keadaan pelayaran.

(3) Isu kelayaklayaran, yang dibangkitkan sebagai pembelaan tidak boleh dikekalkan. Kapal tersebut tenggelam bukan kerana ia tidak layak dilayarkan tetapi kerana cuaca ribut dan laut yang bergelora. Ini didedahkan sendiri dalam laporan akhir responden sendiri yang menyimpulkan bahawa insiden seperti yang dilaporkan boleh berlaku. Adalah tidak berekonomi untuk menyelamatkan dan memperbaiki kapal dan tiada pelanggaran waranti oleh perayu. Laporan mencadangkan responden untuk menyelesaikan tuntutan dan mencadangkan kepada responden bahawa liabiliti penanggung insurans adalah jelas.

Case(s) referred to:

Compania Naviera Vascongada v. British and Foreign Marine Insurance Co Ltd [1936] 54 Lloyd's Rep 35 ***(refd)***

Malayan Motor & General Underwriters Pte Ltd v. Mohamad Hamid Almojil [1982] CLJ 203; [1982] CLJ (Rep) 906 CA ***(dist)***

Provincial Insurance Co Ltd v. Yee Chee Swee [1984] 2 CLJ 12; [1984] 1 CLJ (Rep) 314 FC ***(refd)***

Robertson v. French [1803] 4 East 130 ***(refd)***

The Eurysthenes [1976] 2 Lloyd's Rep 171 ***(refd)***

Thomas v. Tyne and Wear Steamship Freight Insurance Association [1917] 1 KB 938 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 5(2)

Marine Insurance Act 1906 [UK], ss. 25, 39(1), (5)

Other source(s) referred to:

Colinvaux's Law of Insurance, 7th edn, p 488

For the appellant - Tony Ling; M/s Nawi, Wong & Partners Assocs
For the respondent - Arther Lee; M/s Arthur Lee, Lin & Company Assocs

[Appeal from High Court, Sibu; Civil Suit No: 22-36-2004]

Reported by Najib Tamby

JUDGMENT

Abu Samah Nordin JCA:

[1] The appellant's claim against the respondent in the High Court below was for a sum of RM450,000 based on marine insurance policy issued by the latter, being the total sum insured for the appellant's barge and machinery and boilers, which sank in rough waters near Kuala Igau, Sarawak while carrying timber logs. The appellant also claimed interest at 6% per annum from 3 June 2002 until full settlement and costs.

[2] The unfortunate incident was unexpected nor was it contemplated. The appellant took out the insurance from the insurer ('the respondent') on 25 January 2002 to insure his barge, 'Eng Tou 68' for a period of 12 months commencing from 25 January 2002 to 24 January 2003. The subject-matter of the policy is described in the schedule as follows:

Marine Hull Schedule

On Hull and Equipment	.....	RM350,000.00
On Machinery and Boilers	.....	RM100,000.00
		RM450,000.00

[3] On the night of 26 January 2002 at about 10.30pm the barge sank in rough seas while carrying logs for Kong Thai (1963) Sdn Bhd and was totally lost. On 7 May 2002 the appellant made a claim in writing against the respondent for the insured sum of RM450,000. The respondent rejected the claim on the grounds of, *inter alia*, misrepresentation of the identity of the barge. On 15 October 2004 the appellant commenced an action against the respondent in the High Court at Sibu Sarawak after all attempts to settle the claim out of court were unsuccessful.

[4] The respondent in its statement of defence repudiated liability on the grounds of false representation, citing among others, the following particulars:

(i) the respondent agreed to issue the cover note on the basis of the appellant's undertaking that a ship survey would be undertaken by McLaren Saksama (Malaysia) Sdn Bhd as is required by maritime insurance practice and a copy of the said survey would be forwarded to the respondent;

(ii) unknown to respondent the appellant brought the ship surveyor to view two other vessels instead of the vessel in question;

(iii) it was not revealed to the respondent that the vessel surveyed was not the vessel in question for which the coverage was sought and which was a condition precedent for the issue of the cover note;

(iv) the insured vessel was not in Sibu port at the time of viewing. It had already set sail for its port of loading or had been lost at the time insurance cover was sought.

[5] The issues to be tried as stated by the learned Judicial Commissioner ('JC') were finally narrowed down to the following:

(i) whether a barge to be insured must be surveyed ie, whether it was compulsory for the barge to be surveyed;

(ii) if the barge needs to be surveyed whether the cover note issued by the defendant is nevertheless valid.

[6] The High Court dismissed the appellant's claim on the ground that the appellant had not adduced any evidence to show the nature of the policy and the full terms of the policy. The learned JC was of the view that the ship was insured to cover voyage in which seaworthiness is a condition precedent before the barge could be insured in view of s. 39(1) of Marine Insurance Act 1906 ('MIA'). Further the appellant did not disclose all information which has bearing to the risk.

[7] For convenience, we reproduce the reasons given by the learned JC in dismissing the appellant's claims:

> My reasons are as follows:
>
> (i) The Plaintiffs have not adduced any evidence to show the nature of the policy, (ii) and full terms of the policy. Further, it is beyond doubt that the ship was insured to

cover voyage and the claim is in consequence of rough sea which is an admitted fact. In consequence, seaworthiness is a condition precedent before the barge can be insured, as per of section 39(1) MIA 1906 or at least there is a duty of disclosure and the plaintiff had failed to do so, (iii) Further, there is a duty to disclose all information, which has bearing to the risk. In this case it was not done.

In *Joel v. Law Union & Crown Insurance Co* [1908] 2 KB 863 Fletcher Moulton LJ opined:

> The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess. I must not be misunderstood. Your opinion of the materiality of that knowledge is of no moment. If a reasonable man would have recognized that it was material to disclose the knowledge in question, it is no excuse that you did not recognized it to be so. But the question always is, was the knowledge you possessed such that you ought to have disclosed it?

[See in *Lambert v. Co-operative Insurance Society Ltd* [1975] 2 Lloyd's Rep. 485]

(v) In addition, section 18 of the MIA 1906 states:

(1) Subject to the provisions of this section the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material, which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:

(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge and matters, which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by the assured..

(vi) It is now well established that it is the duty of the insured to disclose information, which a prudent insurer would regard as material. In this case, there was no survey done and it was not established whether the ship was seaworthy. For the plaintiff to argue that it can insure a barge when it is not seaworthy runs foul of marine insurance law.

[8] The learned JC was also of the view that the facts before him were similar to the facts in *Malayan Motor & General Underwriters Pte Ltd v. Mohamad Hamid Almojil* [1982] CLJ 203; [1982] CLJ (Rep) 906 where the Court of Appeal (Singapore) held that the policy in that case was not a time policy *simpliciter* but was a 'mixed policy'.

[9] In that the case, the respondent bought the vessel from Singapore Shipping Industries (Private) Limited ("SSI"). The respondent wanted to use it to ferry 30 to 40 persons to and from platforms at sea, as he was involved in the business of construction of oil refineries and offshore installations in Saudi Arabia. SSI agreed to arrange for the delivery of the vessel to the respondent from Singapore to Damman and take out a hull policy on behalf of the respondent for an insured sum of $1.25 million which covered a period between 21 April 1975 and 20 April 1976. The policy contained the following warranty:

(a) Trading within Persian Gulf but including one delivery from Singapore to Persian Gulf on its own steam sailing on or about 21 April 1975.

(b) ...

(c) Subject to satisfactory condition of survey by approved surveyors.

[10] SSI delivered the vessel to the respondent on or about 23 May 1975. The vessel sailed from Singapore to Damman on 30 May 1975. But on reaching the Indian Ocean, it encountered stormy winds and high seas which caused, among others, the engines to malfunction and the radar inoperative. It was forced to stop in Colombo for repairs which took more than two months. After it left Colombo for Damman the weather worsened and the vessel eventually capsized. It was a total loss. The appellant, as underwriter, denied liability.

[11] The major issues in that case turned on the construction of the policy. The first issue in that appeal was whether the policy in question was a time policy or a mixed policy such that the respondent had not warranted that the vessel would be seaworthy on sailing from Singapore. If it is a time policy, there is no question of the respondent having warranted that the vessel would be seaworthy on sailing and accordingly no breach of the policy by the respondent. The respondent contended that it was a time policy as the contract in terms of the policy was for a definite period of time and not between two termini. The Singapore Court of Appeal held that it was not a time policy *simpliciter* but a "mixed policy" affording a cover of 12 months and attaching as from and on the voyage from Singapore to the Persian Gulf. The court in that case found that the vessel was not seaworthy and that the respondent was in breach of the warranty of seaworthiness. The respondent did not comply with warranty (c) which was a condition precedent to the risk attaching.

[12] Learned counsel for the appellant submitted that the learned JC erred in holding that the appellant did not adduce evidence on the nature and the terms of the policy and in relying on the Singapore case when the facts in that case and the facts in the instant appeal were manifestly different.

[13] We agreed with the contention of learned counsel for the appellant that the learned JC had misdirected himself in holding that the appellant had not adduced any evidence to show the nature of the policy and the full terms of the policy. The proposal form and the marine insurance policy dated 25 January 2002 between the appellant and the respondent were before the court. The respondent did not, in its defence deny issuing the policy. The terms of the policy are contained in the policy itself.

[14] The main issue before us was on the nature or the type of policy. The High Court held that it was a voyage policy. The appellant contended that it was a time policy. The nature of the policy in question has a direct bearing on the outcome of the appeal before us.

[15] It is not disputed by the parties that by virtue of s. 5(2) of the Civil Law Act 1956, the law applicable is the English Maritime Insurance Act 1906 ('MIA'). The MIA is an Act which codifies the common law relating to marine insurance. (See *Halsbury's Laws of England*, 5th edn. para. 238).

[16] Thus the nature of the policy must be determined by looking at the terms of the policy itself and in general by reference to the merchant law as codified in the MIA. This is essentially a matter of construction of the policy and the relevant provisions in the MIA.

[17] A marine policy is to be construed like any other contract. This is done by looking at the terms used in the policy, which terms are themselves to be understood in their primary, natural, ordinary and popular sense. In *Robertson v. French* [1803] 4 East 130 Lord Ellenborough CJ said:

> In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases: it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy insurance, *viz* that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense.

[18] The Federal Court in *Provincial Insurance Co Ltd v. Yee Chee Swee* [1984] 2 CLJ 12; [1984] 1 CLJ (Rep) 314; [1984] 2 MLJ 60 expressed the same view:

> A policy of insurance is basically subject to the same rules of construction as any other written contract. The words used in it must be given their plain, ordinary meaning but in the context of the policy looked as a whole and subject to any special definition contained in the policy - *Jason v. British Trades' Insurance Co Ltd* [1969] 1 Lloyd's Rep 281, 290.

A similar approach was taken by the Singapore Court of Appeal in *Malayan Motor & General Underwriters Pte Ltd v. Mohamad Hamid Almojil*, *supra*.

[19] The terms 'time policy' and 'voyage policy' are defined in s. 25 of the MIA:

> 25. Where the contract is to insure the subject-matter "at and from", or from one place to another or others, the policy is called a "voyage policy", and where the contract is to insure the subject-matter for a define period of time the policy is called a 'time policy'. A contract for both voyage and time may be included in the same policy.

[20] The distinction between time and voyage policies is significant because the risk under the two types of policy commences and terminates at different times; the assured under a voyage policy is duty bound to commence and maintain the voyage without delay, deviation or change of voyage and there is no implied warranty of seaworthiness in a time policy (see *Colinvaux's Law of Insurance*, 7th edn. p. 488). In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured (s. 39(1), MIA).

[21] The learned JC held that the policy was a voyage policy and thus, seaworthiness was a condition precedent before the barge could be insured in view of s. 39(1) of the MIA. It was the respondent's contention all along that the barge must first be surveyed to determine its seaworthiness which is a condition precedent before the issuance of the cover note. This was in fact not done as the ship surveyor was shown different vessels and not the vessel in question, namely 'Eng Tou 68', which was not in the dock at the time of inspection. The burden was on the appellant to prove that the barge was seaworthy at the start of the voyage.

[22] We note that the respondent's standard proposal form includes a column requiring the appellant to state the date of last survey and the name of the ship surveyor. This was duly disclosed by the appellant. The policy issued to the appellant did not however include an express term that the ship must be subject to prior survey.

[23] The provision relating to seaworthiness can be found in s. 39 of the MIA. Section 39 states:

> 39. Warranty of seaworthiness of ship
>
> (1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.
>
> (2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.
>
> (3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.
>
> (4) A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.
>
> (5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

[24] It is clear from s. 39 above that the implied warranty of seaworthiness depends on the type of policy issued. In a voyage policy, there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured (s. 39(1)). In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness. Section 39 does not make it mandatory that a ship survey must be made immediately

before every marine insurance policy is issued. This is self evident as there is already an implied warranty in s. 39(1) MIA that in a voyage policy the ship shall be seaworthy.

[25] An insurer may insist on a ship survey as a condition precedent in a time policy as there is no implied warranty in law that the ship shall be seaworthy. But that was not the position taken by the respondent. The respondent contended that the policy was a voyage policy and a survey must be done before the issuance of the cover note or policy.

[26] We have read and reread the policy in question. The policy covers a period of "12 months from 0.01am 25 January 2002 to 24 January 2003 Malaysia time". As referred to earlier the subject matter of the policy is:

(i) Hull and equipment for RM350,00; and

(ii) Machinery and Boilers for RM100,000.

The total sum insured is RM450,000. There is nothing in the policy stating that the contract is to insure the said subject matter "at and from" or from one place to another or others. It simply refers to policy cover for a fixed period. In our judgment the policy is clearly a 'time policy' within the meaning of s. 25 of the MIA. Being a time policy there is no implied warranty that the vessel shall be seaworthy at any state of the adventure. It is neither a 'voyage policy' nor a 'mixed policy' referred to in *Malayan Motor & General Underwriters Pte Ltd*, *supra*. The facts in that case were manifestly different from the facts before us. The terms of the policy were also different. In that case, it was a term of the warranty that the ship was subject to a satisfactory condition of survey. There is no such condition precedent in the case before us. Had the High Court scrutinised the terms of the policy in question, its decision could have been different. There is absolutely no basis, in facts and in law, to support the conclusion that the policy was a voyage policy. The appellant had disclosed fully all information in answers to all questions in the proposal form. The last survey was done on 13 March 2001. Section 39 of the MIA does not make it mandatory that a prior survey must be done before any policy can be issued.

[27] It was held in *Thomas v. Tyne and Wear Steamship Freight Insurance Association* [1917] 1 KB 938 that where a ship was sent to sea in a state of unseaworthiness in more than one respect, and the assured was privy to some, but not all, of the defects, the insurer would be liable unless the assured was privy to the particular defect which caused the loss. In *Compania Naviera Vascongada v. British and Foreign Marine Insurance Co Ltd* [1936] 54 Lloyd's Rep 35 at p. 58 Branson J held that mere omission to take precautions against the ship being unseaworthy did not make the owner privy to any unseaworthiness which that precaution might have disclosed.

[28] The meaning of the words, "with the privity of the assured" in s. 39(5) of the MIA had been explained in *The "Eurysthenes"* [1976] 2 Lloyd's Rep 171. Lord Denning at p. 179 said:

> "Privity" did not mean that there was any wilful misconduct by him, only that he knew of the act beforehand and concurred in it being done. Moreover, "Privity" did not mean that he himself personally did the act, but only that someone else did it and that he knowingly concurred in it. Hence, in the later Merchant Shipping Acts, the owner was entitled to limit his liability if the act was done "without his actual fault or privity". Without his "actual fault" meant without any actual fault by the owner personally. Without his "privity" meant without his knowledge or concurrence.
>
> Such is, I think, the meaning we should attach to the word "privity" in s. 39(5). If the ship is sent to sea in an unseaworthy state, with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable to unseaworthiness, that is, to unseaworthiness of which he knew and in which he concurred.
>
> To disentitle the shipowner, he must, I think, have knowledge not only of the facts constituting the unseaworthiness but also knowledge that those facts rendered the ship unseaworthy, that is, not reasonably fit to encounter the ordinary perils of the sea. And, when I speak of knowledge, I mean not only positive knowledge but also the sort of knowledge expressed in the phrase "turning a blind eye". If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry - so that he should not know it for certain - then he is to be regarded as knowing the truth. This "turning a blind eye" is far more blameworthy than mere negligence. Negligence in not knowing the truth is not equivalent to knowledge of it.

The evidence before the court did not show that the appellant had knowledge that the vessel was unseaworthiness.

[29] Unseaworthiness is a question of fact, the burden of proof of which is on the insurer (see para. 265, *Halsbury's Law of England*, 5th edn.) The respondent had not established that the ship was not seaworthy at any stage of the adventure. On the contrary the respondent's own report, titled "Final Report" demolished any suggestion that the ship sank because it was not seaworthy.

[30] In fact, the issue of seaworthiness, raised as a defence by the respondent did not hold water. The vessel sank not because it was not seaworthiness but because of stormy weather and high seas. This was disclosed in the respondent's own 'Final Report' dated 26 January 2002 prepared by Mclarens Toplis. The report concluded that "an incident as reported could have occurred", it would not be economical to salvage and repair the vessel and that there was no breach of warranties by the appellant. The report recommended that the respondent settle the claim and advised the respondent that, 'insurers' liability appears to be apparent'.

[31] For the reasons as aforesaid, we allowed the appeal with costs, set aside the judgment of the High Court and ordered that judgment be entered as in prayers (a), (b) and (c) of statement of claim.